88-1214

Supreme Court, U.S.
FILED
JAN 21 1989
JOSEPH E. SPANIOL, JR.
CLERK

No. . . . . , Misc.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DORCHEN LEIDHOLDT,

Petitioner,

v.

L.F.P., INC., a California corporation, also sometimes designated as LFP, INC.; L.F.P. INC., d/b/a LARRY FLYNT PUBLICATIONS; HUSTLER MAGAZINE, INC., a California corporation; LARRY FLYNT, a citizen of California; FLYNT SUBSCRIPTION COMPANY, INC., a Nevada corporation; LARRY FLYNT DISTRIBUTING COMPANY, INC., a California corporation; N.MORGAN HAGEN; DAVID KAHN, and JIM GOODE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Is a pornographic verbal depiction of Dorchen Leidholdt in *Hustler* Magazine, which vilified her and portrayed a photograph of her in the naked rear end of a bent over man entitled to be classified as protected opinion?
2. Does the classification of a pornographic verbal depiction of Dorchen Leidholdt in *Hustler* Magazine as protected opinion exceed the scope of such protected opinion contemplated by Gertz v. Welch?
3. Should this Court review the decision of the United States Court of Appeals for the Ninth Circuit in order to delineate the parameters of what is protected opinion in order to guide future decisions concerning pornographic attacks like *Hustler* directed at Peggy Ault?
4. Should this Court resolve a conflict in the tests for what is protected opinion between the United States Courts of Appeal for the Second and Ninth Circuits?
5. Should *Hustler*'s attack on Dorchen Leidholdt be viewed as commercial speech or speech "for the purpose of trade" in the context of claims for invasion of privacy of a New York resident?

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L.F.P., INC., a California corporation, also sometimes designated as LFP, INC.; et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Dorchen Leidholdt respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on October 26, 1988. That decision affords the protection of opinion to an extent that petitioner asserts is beyond the scope of

protection of speech intended by the Constitution or this Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reproduced and attached in full as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed October 26, 1988. No petition for rehearing or other proceedings were instituted. This Petition for a Writ of Certiorari is filed within ninety (90) days of October 26, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are the First Amendment[1] and Fourteenth Amendment[2] to the United States Constitution.

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[1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

[2] Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The claims made by Dorchen Leidholdt arose from a publication titled "Asshole of the Month." The article appeared in *Hustler Magazine*. It contained numerous defamatory, pornographic references to Dorchen Leidholdt. *Hustler* also superimposed a photograph of Dorchen Leidholdt over the rear end of a bent over naked man. A reproduction of the article is attached as Appendix B. Its text is stated in full in this Petition, *infra*.

Dorchen Leidholdt originally filed her claims against *Hustler* in the United States District Court for the District of Wyoming. The case was transferred to United States Court for the Central District of California. Jurisdiction was based on 28 U.S.C. Sec 1332, diversity of citizenship.

Dorchen Leidholdt is a resident of New York. She has been active in many issues related to women's rights. She has been an active opponent of pornography in America. She acknowledged in her complaint that she is a public figure.

Dorchen Leidholdt's opposition to pornography apparently singled her out for an attack by *Hustler Magazine*. By naming her "Asshole of the Month," *Hustler* instituted a vituperative, personal, and defamatory attack on Dorchen Leidholdt herself, as opposed to a discussion of her viewpoints on matters of public interest.

The text and nature of words used against Dorchen Leidholdt are critical to an analysis of their defamatory nature. For that reason, the text of the article is set forth in full:[3]

> *Tight-assed* and *sexually repressed* are two words that can easily be applied to the pathetic scumbags leading the current crusade against pornography. But to describe Dorchen Leidholdt, our June Asshole of the Month, in those terms might be misleading. Although Leidholdt certainly qualifies as sexually repressed, this pus-bloated walking sphincter is anything but tight. On an all-too-regular basis this flapping fart-hole discharges the rotting feces she passes off as arguments supporting her unfounded belief that pornography causes rape and violence against women. *HUSTLER* has exposed these arguments time and again as having less weight than an Ethiopian on a hunger strike, but this reeking rectum refuses to accept the truth.
>
> And no wonder. Anyone who believes, as Leidholdt does, that sex is humiliating and painful clearly is not going to let the truth change her mind.
>
> Another reason: Leidholdt, a founding member of Women Against Pornography, has finally achieved prominence as a spokeswoman for this frustrated group of sexual fascists. She's had a long wait for national recognition, but now that bigger names such as Gloria Steinem have

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[3]The reproduction of the article, Appendix B, is attached to demonstrate the physical layout of the article and the use of Dorchen Leidholdt's picture.

drifted out of the spotlight, Dorchen - like a buoyant turd in a toilet - has bobbed to the surface to take their places.

Here's a sample of the bizarre paranoia that underlies the vengeful hysteria of these mind-fucked feminists: On a recent Cable News Network talk show Leidholdt said, "Pornography affects our everyday lives to the extent that we can't move about without being afraid of an attack or without being sexually assaulted." It's demented thinking like this that gives rape victims a bad name.

To back up this wacko statement, Leidholdt claims to have "an overwhelming body of evidence that shows that pornography makes all women the potential or actual victims of sexual violence." This is, of course, absolute dogshit. Study after study has shown that porn either does *not* cause sexually aggressive behavior or has failed to show that it does.

Nevertheless, Leidholdt and her twisted WAP "sisters" are dedicated to the proposition that pornography is to blame for just about every ill suffered by womankind. And these bitter bungholes intend to cure this supposed suffering by eliminating, through censorship, everything they consider to be pornographic. Hating men, hating sex, and hating themselves as they do, you can be sure their list is a long one.

We'd like to laugh off this Asshole as a harmless fanatic, but censorship is no laughing matter: Any attack on the First Amendment's guarantee of freedom of expression is deadly serious.

Dorchen Leidholdt's action against the defendants was for libel, intentional infliction of

emotional distress, false light invasion of privacy, misappropriation of image, and public disclosure of private facts. She asserted that the article and use of her picture made the following false statements of fact and created the following false images of her:

--That she was "sexually repressed."

--That she believes sex is humiliating and painful.

--That she hates men.

--That she hates sex.

--That she hates herself.

--That she is mentally ill, suffers from "bizarre paranoia," "vengeful hysteria," has "demented thinking," makes "wacko statements," and is "twisted."

--That she is a "pus-bloated walking sphincter," "anything but tight," is a "flapping fart-hole," a "reeking rectum," and a "bitter bunghole."

--That she possessed "unfounded beliefs."

--The use of her picture objectifies her, and makes her a part of the pornography she opposes.

The case was dismissed in its entirety by the trial court on Rule 12 motions to dismiss. The trial court ruled that the article was protected opinion. The United States Court of Appeals for the Ninth Circuit ruled similarly--that Dorchen Leidholdt's claims for libel, intentional infliction of emotional harm, false light, and invasion of privacy were barred because the article was protected opinion. The United States Court of Appeals for the Ninth Circuit held that there was no

liability for misappropriation of image because *Hustler* did not use the photograph exclusively for its commercial gain. Finally, the appellate court upheld the dismissal of the claim for public disclosure of private facts because Dorchen Leidholdt did not argue that any of the facts disclosed about her were true.

REASONS FOR GRANTING THE WRIT

The decision below is an unjustified extension of Gertz v. Welch, 418 U.S. 323 (1974) and Hustler Magazine, Inc., v. Falwell, 108 S.Ct. 876 (1988).

Protected Opinion

Since the decision in Gertz v. Welch, *supra*, federal and state appellate courts have given undue emphasis to the *dicta* that "there is no such thing as a false idea." *id.*, at 418 U.S. 339. Overly broad, subjective, and convoluted tests for what is protected opinion have developed. All speech, no matter how injurious, is potentially "opinion," despite of recognition that:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefensible immunity from liability for defamation. . .Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of

defamation. Gertz v. Welch, *supra*, at 418 U.S. 341.

This would indicate that the absolute right to defame does not exist. However, classification of the attack against Dorchen Leidholdt as protected opinion is tantamount to *carte blanche* authority to *Hustler* to say whatever it wants, however it wants to, regardless of the injury to person or reputation.

In Gertz, Justice Powell observed that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." Gertz, *supra*, at 418 U.S. 340. Similarly, there is no constitutional value in the assault on Dorchen Leidholdt by *Hustler*. A review of the decision of the United States Court of Appeals for the Ninth Circuit would serve to define the parameters of protected opinion in order to prevent future similar abuses.

The attack on Dorchen Leidholdt was clearly defamatory and constituted libel, *per se*, under any test the appellate court could have chosen, whether New York law, California law, or the law of the United States Court of Appeals for the Second or Ninth Circuits. See Forsher v. Bugliosi, 163 Cal. Rptr. 628, 608 P.2d 716 (1980); Selleck v. Globe International, 212 Cal. Rptr. 838, 166 Cal. App.3d 1123; Maidman v. Jewish Publications, 355 P.2d 265 (Cal. 1960); Brown v. Darcy, 783 F.2d 1389 (9th Cir.1986); Rinaldi v. Holt, Rinehart

& Winston, Inc., 397 N.Y.S.2d 943, 42 N.Y.2d 69, 366 N.E.2d 1299 (1977); Silsdorf v. Levine, 462 N.Y.S.2d 822, 59 N.Y.2d 8, 449 N.E.2d 716 (1983); Matherson v. Marchello, 473 N.Y.S.2d 998, 100 A.D.2d 233 (1984); Cianci v. New Time Publishing Company, 639 F.2d 54 (2d Cir. 1980); and Kelly v. Schmidberger, 806 F.2d 44 (2d Cir. 1986).

A rule that protects the words used against Dorchen Leidholdt as opinion exceeds the bounds of the First Amendment and the protection intended by Gertz, *supra*. The plaintiff in Gertz was not denied a his right to redress. But the overextension of the concept that there can be no such thing as a false idea has been used to justify ghastly attacks under the guise of opinion.

Even if there can be no such thing as a false idea, in order to be protected speech, it must convey some idea. But what is the "idea" or "opinion" expressed in the tirade launched against Dorchen Leidholdt by *Hustler*? There is none.

Moreover, seemingly inconsistent results are realized pursuant to the tests individual circuits have employed in attempting to distinguish a false statement of fact from opinion. Gertz, *supra*, did not contemplate the type of assault against Dorchen Leidholdt which is the subject of this matter, and Gertz did not contemplate a convoluted test of what is opinion. Gertz did not authorize the illogical results which deny Dorchen Leidholdt a remedy but allow a church group

to prevail against a man who merely suggested that someone may have tried to kill him, Church of Scientology of California v. Flynn, 744 F.2d 694 (9th Cir. 1984). Gertz did not anticipate that William F. Buckley should prevail against a man who inferred that Buckley may have libelled others, Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), while leaving Dorchen Leidholdt totally without a remedy. Gertz did not intend that a statement by a president of a priestly society, which suggested that some members had placed church property in their own names, would not be classified as opinion, Kelly v. Schmidberger, *supra*, while the base attack on Dorchen Leidholdt by *Hustler* would be classlified as opinion.

The United States Court of Appeals for the Ninth Circuit applied its own test of what is protected opinion to Dorchen Leidholdt's claims. But Dorchen Leidholdt is a citizen of New York and choice-of-law rules probably mandate application of the New York or United States Court of Appeals for the Second Circuit test. Hanley v. Tribune Publishing Company, 527 F.2d 68 (9th Cir. 1975) suggests that the law of Dorchen Leidholdt's domicile should apply. Dorchen Leidholdt took the position that she should prevail under any choice of laws. The United States Court of Appeals for the Ninth Circuit reasoned that the choice-of-laws issue did not need to be resolved, since its grounds for affirmation were rooted in protected opinion.

This Court should review the decision below because there is a conflict in the tests for what is protected opinion between the United States Courts of Appeal for the Second and Ninth Circuits. Further, if the test of the United States Court of Appeals for the Second Circuit had been applied, Dorchen Leidholdt could have expected a different result.[4]

The test in the United States Court of Appeals for the Ninth Circuit for opinion is:

> 1. Whether the words can be understood in a defamatory sense in light of the facts surrounding the publication, including the medium by which, and the audience to which, the statement is disseminated;
>
> 2. Whether the context in which the statements were made, e.g., public debate or a labor dispute, would lead the audience to anticipate persuasive speech such as "epithets, fiery rhetoric or hyperbole;" and
>
> 3. Whether the language used is the kind generated in a "spirited legal dispute."

This test is a product of a line of decisions, including Information Control Corporation v. Genesis One Computer Corporation, 611 F.2d 781 (9th Cir. 1980); Lewis v. Time Incorporated, 710 F.2d 549 (9th Cir. 1983); Church of Scientology of California v. Flynn,

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[4]The Court below applied its own test, Opinion, Appendix A, p.A-6.

supra; Yagman v. Baden, 796 F.2d 1165, (9th Cir. 1986); and Koch v. Goldway, 817 F.2d 507, (9th Cir. 1987).

The test in the United States Court of Appeals for the Second Circuit, from Mr. Chow of New York v. Ste. Jour Azur, S.A., 739 F.2d 219 (2d Cir. 1985), and Kelly v. Schmidberger, *supra*, at 806 F.2d 47, is:

> 1. Examine both the context in which the statements are made and the circumstances surrounding the statements.
>
> 2. Look at the language itself to determine if it is used in a precise, literal manner or in a loose, figurative or hyperbolic sense.
>
> 3. Examine the statements to determine if they are objectively capable of being proved true or false. (If so, it is not opinion.)
>
> 4. Even if the above analysis indicates that the statement is opinion, determine if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. (If so, it is not opinion.)

Both of the above tests give emphasis to the context of the alleged libel. The appeals court in Dorchen Leidholdt's case did as well. The nature of *Hustler*, it was reasoned, and the nature of *Hustler*'s probable readership, somehow transformed the assault on Dorchen Leidholdt into protected opinion. It is Dorchen Leidholdt's position that this emphasis on the context of the speech has been expanded far beyond the intent of Gertz, *supra*, and related cases from this Honorable Court.

Letter Carriers v. Austin, 418 U.S. 264 (1974), and Greenbelt Cooperative Publishing Association, Inc., v. Bressler, 398 U.S. 6 (1970), appear to be the cases from which the emphasis on context derives. But Letter Carriers, *supra*, involved speech in the context of a heated labor dispute. It had the added factor of the Labor Management Relations Act which encouraged free debate on issues dividing labor and management. This Court's decision encouraged free debate in a heated setting such as a labor dispute. Greenbelt, *supra*, was a case concerning statements made during a debate at a city council meeting, where some citizens characterized the negotiating position of an applicant for a zoning variance as "blackmail." The decision of this Court approved such speech and became the basis for tests which look to "heated public debate," "rhetorical hyperbole," and the "vigorous epithet."

Petitioner takes no issue with encouragement of heated public debate. However, when the parameters of the above cases are stated in the abstract, and then applied to an attack like that of *Hustler* against Dorchen Leidholdt, she asserts that the intent of this Honorable Court is violated and that the scope of protected speech is extended beyond the First Amendment. The spontaneous situation in Greenbelt, *supra*, was a far cry from the deliberate, calculated attack on Dorchen Leidholdt conceived in the lengthy editorial process of *Hustler Magazine*. A review of this case would allow

better definition of the real force the context of the speech should have in the protected-opinion analysis.

If the test for opinion of the United States Court of Appeals for the Second Circuit was applied to Dorchen Leidholdt's case, she would be entitled to a different result. That test asks whether statements are objectively provable as true or false. If so, then they are not opinion but statements of fact. The test also recognizes that if the statements about Dorchen Leidholdt imply that *Hustler* knows undisclosed defamatory facts, then the statements are not opinion.

Several statements about Dorchen Leidholdt were alleged to be false and are capable of being proven as true or false. Foremost in this category are the statements that she is "sexually repressed," that she "believes sex is humiliating and painful," that she "hates men," that she "hates sex," and that she "hates herself." The appeals court acknowledged that these statements were "closer to the mark,"[5] as being false assertions of fact. Under the test of the United States Court of Appeals for the Second Circuit, they could be proven as false statements of fact--and should not summarily have been categorized as protected opinion by the court below.

In Dorchen Leidholdt's case, the opinion below gave emphasis to this Court's recent decision in Hustler

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[5]Opinion, Appendix A, p.A-7.

Magazine v. Falwell, *supra*. But Falwell is distinguishable from the attack on Dorchen Leidholdt. Furthermore, review by this Honorable Court of the application of the defense of protected opinion to claims for intentional infliction of emotional distress is urged.

The principal distinguishing factor between Dorchen Leidholdt's case and the Falwell case is that there was a specific jury finding that the publication about the Rev. Falwell made no statement of fact about him. The Falwell publication was parody--and the publication explicitly stated this. But there has been no jury finding that there was no false statement of fact about Dorchen Leidholdt. The "Asshole of the Month" publication about Dorchen Leidholdt did nothing to identify itself as opinion or editorial.

It is true that Falwell, *supra*, requires proof of a false statement of fact and actual malice in order for a public figure to recover for intentional infliction of emotional distress. Dorchen Leidholdt made such allegations. Under the test of the United States Court of Appeals for the Second Circuit, several statements about Dorchen Leidholdt should have been construed as false statements of fact rather than opinion.

Even if all the statements about Dorchen Leidholdt would be construed as opinion, they should be judged actionable as the basis for a claim of intentional infliction of emotional distress. To this

extent, Dorchen Leidholdt seeks clarification or a review of the result in Falwell, *supra*.

The requirement that a public figure prove actual malice in a claim for intentional infliction of emotional distress is sufficient protection for the "breathing space" for free expression which Hustler Magazine, Inc., v. Falwell, *supra*, establishes. It is enough of a burden for a plaintiff, like Dorchen Leidholdt, to prove such actual malice. Requiring proof of actual malice in an intentional infliction of emotional distress case is precisely the protection which this Court has endeavored to offer publishers in New York Times v. Sullivan, 376 U.S. 254 (1964), and its progeny.

In the context of an intentional infliction of emotional injury claim, the gravamen of the claim is a direct injury to the person's emotional status. Falwell recognizes this, and recognizes the interest of the state and individuals to protect people from unjustified assaults. "Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question in sufficiently 'outrageous.'" Hustler Magazine, Inc., v. Falwell, *supra*, at 108 S.Ct. 880.

A defamatory statement, whether it is a libel or an opinion, can hurt an individual. Extension of the cloak of Falwell to immunize all purported statements

of opinion from claims for intentional infliction of emotional distress gives the publisher unfettered power to hurt and leaves the victim without remedy. The requirement of proof of actual malice is sufficient protection for the publisher and it should not be supplemented with convoluted, inconsistent extensions of the doctrine of protected opinion.

Misappropriation of Image

The United States Court of Appeals for the Ninth Circuit did not properly apply developing law in New York for the tort of misappropriation of image. Review of this issue is requested of this Honorable Court because a resolution is extremely significant to the rights of Dorchen Leidholdt. In this context, consideration should also be given to recognition of *Hustler* as commercial speech.

In its decision, the court below found that the photograph of Dorchen Leidholdt accompanied an article which was opinion, and not purely commercial. As such, the court reasoned, the commercial purpose required for a claim of misappropriation of image was not present in this case.

However, substantive law of the State of New York would mandate a different result. The right to recover for invasion of privacy in New York is controlled by statute. Section 51 of the Civil Code provides, in pertinent part, as follows:

> Any person whose name, portrait or picture is used within this state for advertising purposes or for the purpose of trade without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this State against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. (Emphasis added)

Davis v. High Society Magazine, 457 N.Y.S.2d 308, 90 A.D.2d 374 (1982), and Marcinkus v. NAL Publishing, Inc., 522 N.Y.S.2d 1009 (1988), demonstrate the breadth of the "purpose of trade" requirement of New York's privacy statute. Davis involved the use of a photograph of a person who closely resembled the plaintiff, but the defendants denied it was her. Marcinkus concerned a fictional work about Archbishop Paul Marcinkus in which the fictional character bore many resemblances to the real person and, in the story, conceived a plan to assassinate a Soviet Premier. Both cases established that a falsehood--a fictionalization--about an individual can be the basis for a claim in New York for violation of the privacy statute cited above.

According to the Davis court, "a finding that a publication was for the purposes of trade may be predicated on either the lack of a reasonable connection between the use and a matter of public interest, or on a finding that the use contained substantial

fictionalization or falsification." Davis v. High Society Magazine,Inc., *supra*, citing Pagan v. New York Herald Tribune, 32 A.D.2d 341, 301 N.Y.S.2nd 120, Aff'd. 26 NY2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727. (Emphasis added.) In Marcinkus, the court declared that "[A] knowing fictionalization, and surely an entire work of fiction, is actionable under Section 51, even under the standards of New York Times v. Sullivan and Time v. Hill, *supra*."

Dorchen Leidholdt's name and likeness were used in a fashion tantamount to fictionalization. Untrue statements were made about her, whether they are categorized as statements of fact or opinion. This misuse of likeness and identity is sufficient to satisfy New York law and this Court should review the refusal of the United States Court of Appeals for the Ninth Circuit to recognize such a remedy.

Dorchen Leidholdt also urges this Court to undertake such a review for the purpose of considering *Hustler* as commercial speech, entitled to less protection than given by the court below. This concept has been suggested in a dissenting opinion by Judge Edith Jones in Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987), in the context of commercial speech discussions from this Court in Dun & Bradstreet v. Greenmoss, 472 U.S 749 (1985):

> Measured by this standard, both *Hustler* in general and "Orgasm of Death" in particular

> deserve limited only first amendment protection. *Hustler* is a profitable commercial enterprise trading on its prurient appeal to a small portion of the population. It deliberately borders on technical obscenity, which would be wholly unprotected, to achieve its purposes, and its appeal is not based on cognitive or intellectual appreciation. Because of the solely commercial and pandering nature of the magazine, neither *Hustler* nor any other pornographic publication is likely to be deterred by incidental state regulation. No sensitive first amendment genius is required to see that, as the court concluded in Dun & Bradstreet, "[t]here is simply no credible argument that this type of [speech] requires special protection to insure that "debate on public issues [will] be uninhibited, robust and wide-open." Herceg v. Hustler Magazine, Inc., *supra*, at 814 F.2d1028.

Hustler should be given no more protection than commercial speech. *Hustler*'s only interest in attacking Dorchen Leidholdt is to further its own circulation. Limited protection of the right of *Hustler* to continue as a commercial vehicle of pornography may is the extent of protection to which it should be entitled. To do so would leave injured persons like Dorchen Leidholdt with a remedy for the obvious harm done to their person and reputation.

CONCLUSION

For the reasons above stated, Dorchen Leidholdt requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX - A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DORCHEN LEIDHOLDT,
Plaintiff-Appellant,

v.

L.F.P. INC.; L.F.P. INC., dba Larry Flynt Publications; HUSTLER MAGAZINE, INC.; LARRY C. FLYNT; ALTHEA FLYNT; FLYNT SUBSCRIPTION COMPANY, INC.; ISLAND DISTRIBUTING COMPANY, a B.W.I. Company; LFZ, LTD., a B.W.I. Company; LARRY FLYNT DISTRIBUTING COMPANY, INC.; N. MORGEN HAGEN; DAVID KAHN; JIM GOODE,
Defendants-Appellees.

No. 87-6328
D.C. No.
CV-86-7836-TJH
OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted
April 7, 1988—Pasadena, California

Filed October 26, 1988

Before: Thomas Tang, Betty B. Fletcher and
Harry Pregerson, Circuit Judges.

Opinion by Judge Fletcher

SUMMARY

Torts

Affirming a dismissal of a complaint for libel, the court held that an article published by defendant expressed an opinion and did not use plaintiff's picture for commercial gain.

Leidholdt, a vigorous opponent of pornography, appeals the court's dismissal of her action for libel, intentional infliction of emotional distress and invasion of privacy against Hustler Magazine. Leidholdt's claim was based on Hustler's portrayal of her in the "Asshole of the Month" column.

[1] Hustler is known for its pornographic content and the "Asshole of the Month" column presents opinions, not allegations of fact. **[2]** Hustler is an active participant in an ongoing, heated debate on pornography and its vituperation will be read as exaggerated criticism of plaintiff's views. **[3]** Hustler's article is an expression of opinion in an important public debate and Leidholdt's claim for defamation is not actionable. **[4]** Plaintiff did not state a valid claim for misappropriation of image. **[5]** She also failed to state a claim for public disclosure of private facts.

COUNSEL

Gary L. Shockey, Spence, Moriarity & Schuster, Jackson, Wyoming, for the plaintiff-appellant.

David O. Carson, Cooper, Epstein & Hurewitz, Beverly Hills, California, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Dorchen Leidholdt appeals the district court's dismissal, for failure to state a claim, of her diversity action for libel, intentional infliction of emotional distress, and invasion of privacy arising from an article Hustler published about her. She also appeals the district court's indication that it will award sanctions against her and her attorney. We affirm the dismissal of Leidholdt's tort claims; we dismiss the sanctions issue for lack of jurisdiction under 28 U.S.C. § 1291.

BACKGROUND AND PROCEEDINGS BELOW

Dorchen Leidholdt, a New York citizen, is a vigorous opponent of pornography. She is a founding member of the organization Women Against Pornography, has given public speeches against pornography, and has debated its proponents in the national media. By her own description, Leidholdt's activities suffice to make her a "public figure." First Amended Complaint, ER 1, p.2, ¶ 1. Hearing Transcript, ER 2, 11:7-12.

L.F.P., Inc. (Larry Flynt Publications), a California corporation, owns Hustler Magazine (Hustler).[1] Hustler regularly includes an "Asshole of the Month" column, in which some personage whose activities Hustler opposes is vilified in graphic terms. The column has frequently elicited libel actions from its subjects. See especially *Ault v. Hustler Magazine,* No. 87-3684, slip op. [_ F.2d _ (9th Cir. 1988)], a factually similar case decided by this panel; *see also Dworkin v. Hustler Magazine, Inc.,* 647 F.Supp. 1278 (D. Wyo. 1986),

[1]Additional defendants include the publisher, Larry Flynt; the late copublisher, Althea Flynt; several subscription and distributing companies; and three editors allegedly involved in publication of the article at issue, David Kahn, Jim Goode, and N. Morgen Hagen.

668 F.Supp. 1408 (C.D. Cal. 1987)(after transfer); *Spence v. Flynt*, 647 F.Supp. 1267 (D. Wyo. 1986).

Leidholdt brought this action in Wyoming in federal district court following publication of Hustler's June, 1985 issue featuring her in one of its columns. Column reproduced at ER 1, Exhibit A; Appellant's Br. at 2. The article describes and criticizes some of Leidholdt's views of the relationship between pornography and violence, rails against the threat she presents to Hustler's first amendment freedoms, and criticizes Leidholdt and her fellow antipornographers in vivid scatological terms, employing such phrases as "pus bloated", "sexually repressed", "[h]ating men, hating sex, and hating themselves", and "this frustrated group of sexual fascists." The article was accompanied by a small photograph of Leidholdt's face superimposed over the buttocks of a bent-over naked man.

The case was transferred from the District of Wyoming to the Central District of California, *Leidholdt v. L.F.P., Inc.*, 647 F.Supp. 1283 (D.Wyo. 1986), where Hustler moved for dismissal of the complaint for failure to state a claim. Before the hearing Leidholdt voluntarily dismissed some claims for relief, leaving those for libel, invasion of privacy, intentional infliction of emotional harm, and outrage.[2] The district court granted the motion to dismiss these remaining claims, apparently on the ground that the Hustler article was constitutionally protected opinion. At the close of the hearing the judge also asked Hustler to submit a declaration of costs and attorney's fees incurred since transfer of the case to California. ER 2 at 56, 11-12. Apparently Hustler had no motion for sanctions pending at the time.[3]

[2]Leidholdt has conceded on appeal that under California and New York law the tort of outrage is not separable from intentional infliction of emotional distress; we accordingly consider outrage and emotional distress as one claim, though they were separately pleaded in the complaint.

[3]Leidholdt states that a sanctions motion Hustler filed in Wyoming district court, directed at certain claims in the First Amended Complaint, was dropped when Leidholdt stipulated to dismissal of those claims. Appellant's Br. at 43; CR 70.

Leidholdt timely appealed. We have jurisdiction over the dismissed claims under 28 U.S.C. § 1291.

DISCUSSION

The questions presented on this appeal are first, whether the district court erred in dismissing Leidholdt's tort claims, and second, whether we have jurisdiction to review the court's actions regarding sanctions. The parties also dispute whether California or New York law should govern the tort claims; however, given the grounds we find for affirmance, we need not resolve this choice-of-law issue.

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a legal ruling reviewed de novo. *Church of Scientology v. Flynn,* 744 F.2d 694, 695 (9th Cir. 1984). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). All allegations in the complaint must be treated as true. *Flynn,* 744 F.2d at 696.

I. *Libel, Intentional Infliction of Emotional Distress, and False Light*

The threshold question before us is the same as that presented in *Ault v. Hustler*: whether the Hustler article constitutes the expression of an opinion rather than of allegedly factual statements. For the reasons we set forth in *Ault,* if the article expresses opinion, then Leidholdt's claims for libel, intentional infliction of emotional distress, and false light invasion of privacy must fail. Slip op. at _ - _; [_ F.2d at _-_]. Only if the article is not an expression of opinion must we decide whether any of the allegedly false statements are per se defamatory or otherwise actionable.

If Hustler's statements constitute false statements of fact rather than opinion, then Leidholdt, as a public figure, cannot recover for defamation, emotional distress, or false light invasion of privacy unless she also shows that the false statements were made with "actual malice". *Hustler Magazine v. Falwell*, 108 S.Ct. 876, 882 (1988); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).[4]

We turn first, therefore, to whether Hustler's article about Leidholdt was a constitutionally protected expression of opinion. The distinction between alleged fact and opinion is a question of federal law, reviewable de novo. *Lewis v. Time, Inc.*, 710 F.2d 549, 553, 555 (9th Cir. 1983).

This circuit employs a three-part test, first set forth in *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980), for distinguishing protected opinion from other speech. The factors are:

> (1) whether the words can be understood in a defamatory sense in light of the facts surrounding the publication, including the medium by which and the audience to which the statement is disseminated; (2) whether the context in which the statements were made, *e.g.*, public debate or a labor dispute, would

[4]If Leidholdt were not a public figure, under both California and New York law (the disputed sources of governing law), all three tort claims would still succeed or fail together. An emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action; *Flynn v. Higham*, 149 Cal.App.3d 677, 681, 197 Cal. Rptr. 145, 147 (1983); *Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 66 N.Y.2d 988, 499 N.Y.S.2d 395, 489 N.E.2d 1297, *aff'g* 111 A.D.2d 807, 490 N.Y.S.2d 553 (1985); the tort of false light privacy is also, as Leidholdt concedes, sufficiently duplicative of libel to be subject to the same limitations. *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983); *Fellows v. National Enquirer, Inc.*, 42 Cal.3d 234, 228 Cal. Rptr. 215, 218, 721 P.2d 97 (1986).

> lead the audience to anticipate persuasive speech such as "epithets, fiery rhetoric or hyperbole"; and (3) whether the language used is the kind generated in a "spirited legal dispute."

Ault, slip op. at _ (citing *Lewis,* 710 F.2d at 553, and *Information Control,* 611 F.2d at 783-84). Admittedly these factors overlap and will not cover all situations. The crux, however, is whether a reasonable listener or reader should know the speaker did not intend to be taken literally.

[1] Even without resort to the "facts surrounding the publication", Leidholdt's arguments that certain statements would be understood as defamatory in the sense of making false statements of fact about her are unavailing. It strains credulity to accept that the phrase "pus bloated walking sphincter" imputes to Leidholdt a "loathsome disease," or that by using the phrases "wacko", "vengeful hysteria", "twisted", and "bizarre paranoia" Hustler is asserting that Leidholdt is mentally ill. Hustler's statement that Leidholdt holds an "unfounded belief" that pornography causes rape and violence against women is not libelous because Hustler is entitled to question the conclusions she draws from her studies. Closer to the mark is her argument that the article's statements that she is "sexually repressed", believes "sex is humiliating and painful", and that she hates men, hates sex, and hates herself are false assertions of fact. However, even these statements must be considered in the context of the entire article. As we spelled out in *Ault,* the facts that Hustler is a magazine known for its pornographic content and is directed to an audience sympathetic to pornography, and that the "Asshole of the Month" column is an especially frequent vehicle for Hustler's lampooning of its critics, all will telegraph to a reader that the article presents opinions, not allegations of fact. See *Ault,* Slip op. at _; *Fudge v. Penthouse Int'l, Ltd.,* 840 F.2d 1012, 1017 (1st Cir. 1988), *petition for cert filed* May 26, 1988.

Furthermore, the context of the article makes clear that its content is opinion. Even apparent facts must be allowed as opinion "when the surrounding circumstances of a statement are those of a heated political debate, where certain remarks are necessarily understood as ridicule or vituperation, or both, but not as descriptive of factual matters." *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (holding mayor's query whether her political opponent was a Nazi war criminal bearing the same name to be constitutionally protected opinion).

[2] As we concluded in *Ault*, whether Hustler's side of the debate about pornography was presented in print or orally is immaterial. Slip op. at _; _ F.2d at _. While Hustler's remarks were not uttered in live public debate, it nevertheless is an active participant in an ongoing, heated debate on the subject. Readers of the article, recognizing that it concerns a public, vigorous opponent of pornography, will read Hustler's vituperation as exaggerated criticism of the views she holds. "[T]he audience and the audience's anticipations should be considered in determining whether a statement is fact or opinion." *Matter of Yagman*, 796 F.2d 1165, 1176 (9th Cir. 1986).

[3] Fortunately for Hustler, "[b]ase and malignant speech is not necessarily actionable." *Id.* at 510. As the Supreme Court recently noted, "Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate." *Hustler Magazine v. Falwell*, 108 S.Ct. at 881. Thus we are bound to find that Hustler's article is an expression of opinion in an important public debate and accordingly affirm the dismissal of Leidholdt's claims for defamation, intentional infliction of emotional distress, and false light invasion of privacy.

II. *Other Tort Claims*

Count III of Leidholdt's complaint alleges simply that "said publication invades plaintiff's privacy", ER-1 at 13, ¶ 16(b); she has since alleged in pleadings before us and the district court the sub-categories of false light, public disclosure of private facts, and misappropriation of image. The district court gave no grounds for dismissing these claims; however, we may affirm on any basis supported in the record. *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586, 590 (9th Cir. 1987). Having disposed of the false light claim above, we now find that dismissal of the other two torts also was not error.

A) *Misappropriation of image*

[4] Leidholdt argues that Hustler's use of her photograph to accompany the article was a wrongful misappropriation of her image. Under either New York or California law, this fails to state a claim because Leidholdt's image was not used exclusively for Hustler's commercial gain. N.Y. Civ. Rights Law § 51 (provides cause of action for use of picture without consent for advertising or purposes of trade); *Ann-Margret v. High Society Magazine, Inc.*, 498 F.Supp. 401, 406 (S.D.N.Y. 1980); Cal. Civ. Code § 3344 (provides cause of action for commercial appropriation of plaintiff's name or likeness, but excepts "use ... in connection with any news [or] public affairs ... account"); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529-30 (9th Cir. 1984). Instead, as we found in *Ault*, the photograph accompanied an article whose purpose, as an expression of Hustler's opinions in the pornography debate, was not simply commercial. The fact that Hustler Magazine is operated for profit does not extend a commercial purpose to every article within it. *See Davis v. High Society Magazine, Inc.*, 90 A.D.2d 374, 457 N.Y.S.2d 308, 313 (1982).

B) *Public Disclosure of Private Facts.*

California (but not New York) allows tort recovery for "the unwarranted publication of intimate details of one's private

life which are outside the realm of legitimate public interest." *Sipple v. Chronicle Publishing Co.*, 154 Cal.App.3d 1040, 1047, 201 Cal. Rptr. 665, 669 (1984).

[5] Leidholdt argues that Hustler's article, by saying she is "sexually repressed", that she thinks sex is "humiliating and painful", and that she hates men, hates sex, and hates herself, placed private matters before the public in a very offensive way. This fails, however, to state a claim for public disclosure of private facts because an essential element of that tort is that the facts at issue be true. *Sipple*, 201 Cal.Rptr. at 668; Restatement (Second) of Torts, Special Note to § 652D. Leidholdt has not argued that Hustler revealed any embarrassing private *truths* about her.

III. *Sanctions Issues.*

A. *Reviewability of District Court's Action.*

In dismissing Leidholdt's complaint, the district court also directed Hustler to submit a declaration of costs expended since the suit was transferred from Wyoming "to assist the Court in addressing the issue of sanctions pursuant to Rule 11, Federal Rules of Civil Procedure", and retained jurisdiction "for purposes of addressing the issue of sanctions . . . ." ER-3 at 2. During the hearing on Hustler's motion, the court indicated that it would hold the actual imposition of sanctions "in abeyance" pending the Ninth Circuit's review of the sanctions award against the plaintiff in *Ault*, [_ F.2d _].

Before us is Hustler's "Motion to Dismiss Appeal (in Part) and to Strike" those portions of Leidholdt's appellate briefs arguing against the district court's decision to award sanctions. We grant the motion, finding we lack jurisdiction under 28 U.S.C. § 1291 because the sanctions issue presents no appealable final order until the district court makes a ruling. Likewise, the issue whether the district court may sua sponte award sanctions in the absence of a pending motion for sanc-

tions from Hustler is similarly unripe. The district court now has our decision that Rule 11 sanctions were unjustified in *Ault*; thus guided, the court may proceed as it deems appropriate.

B. *Attorney's Fees for Hustler in this Appeal.*

Hustler's request for attorney's fees and double costs, on the ground that Leidholdt's appeal was frivolous under Rule 38 and 28 U.S.C. § 1912 [Appellee's Br. at 49], is denied. As in *Ault*, "where the plaintiff has clearly suffered a grievous assault to her human dignity we do not wish to endorse sanctions which can only serve to chill zealous advocacy." Draft op. at 13; [_ F.2d at _].

CONCLUSION

We affirm the district court's grant of Hustler's motion to dismiss. The article featuring Leidholdt is constitutionally protected opinion; thus, her tort claims for libel, emotional distress and false light invasion of privacy must fail. No private facts were published, and accompanying the editorial with a photograph does not render Hustler liable for misappropriation. We have no jurisdiction to review the propriety of sanctions in advance of an actual award and entry of an appealable order.

The judgment of the district court is AFFIRMED.

APPENDIX - B

ASSHOLE OF THE MONTH

Dorchen Leidholdt

Tight-assed **and** ***sexually repressed*** **are two words that can easily be applied to the pathetic scumbags leading the current crusade against pornography. But to describe Dorchen Leidholdt, our June Asshole of the Month, in those terms might be misleading. Although Leidholdt certainly qualifies as sexually repressed, this pus-bloated walking sphincter is anything but tight. On an all-too-regular basis this flapping fart-hole discharges the rotting feces she passes off as arguments supporting her unfounded belief that pornography causes rape and violence against women. HUSTLER has exposed these arguments time and again as having less weight than an Ethiopian on a hunger strike, but this reeking rectum refuses to accept the truth.**

And no wonder. Anyone who believes, as Leidholdt does, that sex is humiliating and painful clearly is not going to let the truth change her mind.

Another reason: Leidholdt, a founding member of Women Against Pornography, has finally achieved prominence as a spokeswoman for this frustrated group of sexual fascists. She's had a long wait for national recognition, but now that bigger names such as Gloria Steinem have drifted out of the spotlight, Dorchen–like a buoyant turd in a toilet–has bobbed to the surface to take their places.

Here's a sample of the bizarre paranoia that underlies the vengeful hysteria of these mind-fucked feminists: On a recent Cable News Network talk show Leidholdt said, "Pornography affects our everyday lives to the extent that we can't move about without being afraid of an attack or without being sexually assaulted." It's demented thinking like this that gives rape victims a bad name.

To back up this wacko statement, Leidholdt claims to have "an overwhelming body of evidence that shows that pornography makes all women the potential or actual victims of sexual violence." This is, of course, absolute dogshit. Study after study has shown that porn either does not cause sexually aggressive behavior or has failed to show that it does.

Nevertheless, Leidholdt and her twisted WAP "sisters" are dedicated to the proposition that pornography is to blame for just about every ill suffered by womankind. And these bitter bungholes intend to cure this supposed suffering by eliminating, through censorship, everything they consider to be pornographic. Hating men, hating sex and hating themselves as they do, you can be sure their list is a long one.

We'd like to laugh off this Asshole as a harmless fanatic, but censorship is no laughing matter. An attack on the First Amendment's guarantee of freedom of expression is deadly serious.

Gender Bender

Look great, don't they? Before you answer, there's a catch–the she's are also ***he's.*** **These bizarre beauties are featured in the** ***Hollywood She-Male Calendar 1985*** **from Mike Lawson Productions (P.O. Box 348, 18653 Ventura Blvd., Tarzana, CA 91356). They're billed as "The World's Sexiest Transsexual Superstars." Make's you wonder what any gorgeous babe is packing under her skirt.**

FILED
FEB 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1214

IN THE

Supreme Court of the United States

October Term, 1988

DORCHEN LEIDHOLDT,

Petitioner,

vs.

L.F.P., INC., A California corporation, also sometimes designated as LFP, INC.; L.F.P. INC., d/b/a LARRY FLYNT PUBLICATIONS; HUSTLER MAGAZINE, INC., A California corporation; LARRY FLYNT, a citizen of California; FLYNT SUBSCRIPTION COMPANY, INC., a Nevada corporation; LARRY FLYNT DISTRIBUTING COMPANY, INC., a California corporation; N. MORGAN HAGEN; DAVID KAHN, and JIM GOODE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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22pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court overrule the consensus of all the federal circuit courts of appeal, and of this court itself, that statements of opinion are constitutionally protected from suit for libel or intentional infliction of emotional distress?

2. Should this Court overrule the consensus of the federal circuit courts of appeal that whether a statement is a statement of fact or a statement of opinion is a question of law for the court to determine?

3. Should this Court overrule the consensus of the federal circuit courts of appeal that the test for whether a statement is a statement of opinion or a statement of fact is based upon the totality of the circumstances with special emphasis given to context?

4. Should this Court accept Petitioner's invitation to "clarify or review" its unanimous, year-old decision in *Hustler Magazine, Inc. v. Falwell*, _ U.S. __, 108 S.Ct. 876 (1988)?

5. Should this Court review the specific statements published by Respondents about Petitioner to determine whether the United States Court of Appeals for the Ninth Circuit incorrectly concluded that those statements were constitutionally protected statements of opinion?

6. Should this Court review the United States Court of Appeals for the Ninth Circuit's determination, in the matter of New York state law, that a statement of critical editorial opinion by Respondents about Petitioner was not speech "for the purposes of trade" as defined by New York civil rights law §§ 50 and 51?

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No. 88-1214

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DORCHEN LEIDHOLDT,
Petitioner,

vs.

L.F.P., INC., et al.,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1/] herein respectfully request that this Court deny the Petition for a Writ of Certiorari filed by

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1/ The corporate Respondents herein are affiliated with each other. There are no other corporate affiliations required to be reported under Rule 18.1.

Petitioner Dorchen Leidholdt to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit[2/].

I.
STATEMENT OF THE CASE

This case does not present any constitutional issue deserving review. The statements published in *Hustler*, and about which Petitioner complains, were admittedly, harsh and vituperative criticism of Petitioner's public activities and the ideas which she has publicly espoused in her battle against magazines such as *Hustler*. However, nothing in the editorial column could be construed as a false assertion of fact about Petitioner. Rather, as the courts below correctly concluded, the column consisted entirely of statements of constitutionally protected opinion.

Indeed, as is evident from the editorial itself and from the opinion of the court below, the statements complained of were made in the context of a response by *Hustler* to Petitioner's public attacks on *Hustler* and other magazines she considers to be pornographic. Having taken an active role in the debate on pornography, Petitioner's suit complained that *Hustler* had joined in the debate by condemning her and her views.

Petitioner actually concedes that in order to achieve the relief she seeks, it will be necessary for this Court to "clarify or review" (i.e. overrule) its unanimous, year-old decision in *Hustler Magazine, Inc. v. Falwell*, __ U.S. __, 108 S.Ct. 876 (1988). *See* Petition for Writ of Certiorari at 15-16. In *Falwell*, this Court held that whether a public figure claims libel or intentional infliction of emotional distress, he or she "may not recover . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice', i.e., with

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2/ This Brief in opposition is substantially identical to the Brief in opposition filed concurrently herewith by Respondents in the companion case of *Peggy Ault v. Hustler Magazine, Inc., et al., No. 88-1215*, just as Ault's Petition for a Writ of Certiorari is substantially identical to Leidholdt's. Essentially the only difference between the two Petitioners in these two cases is that Petitioner Leidholdt is an acknowledged public figure, while Peggy Ault denies her public figure status.

knowledge that the statement was false or with reckless disregard as to whether or not it was true." 108 S.Ct. at 882. Petitioner has offered no reason whatsoever, let alone any compelling reason, for this Court to reverse itself on this crucial question of First Amendment law.

Petitioner's real but unstated complaint is simply that she does not believe that Hustler, a magazine that she has devoted much time and energy to fighting, should be able to mention her name in a vituperative, critical way. It is now firmly established, however, as a matter of constitutional law that vituperative, pejorative or pernicious opinion is not actionable; indeed, the opinion defense is constitutionally mandated and is now firmly established as the law of all of the federal circuits. Petitioner's attempts to persuade this court to abandon this bedrock of constitutional libel doctrine should be rejected.

II.
REASONS FOR DENYING THE WRIT

1. The Opinion Defense Is Now Firmly Established As A Matter Of Federal Constitutional Law.

Incredibly, Petitioner seeks to turn the pages of history back to the time when the opinion defense had yet to be recognized as mandated by the First Amendment in libel cases. Petitioner appears to suggest that the various circuit courts, in a number of opinions in this area, have misread precedent and overstated the protection afforded to opinion in libel cases.

There is simply no reason for this Court to acquiesce to Petitioner's desire to repeal this well-settled doctrine. "It is by now well-settled that there exists a constitutional privilege for expressions of opinion." *Matter of Yagman*, 796 F.2d 1165, 1172 (9th Cir. 1986), *cert. den.*, _ U.S. _, 108 S.Ct. 450 (1987). "The constitutional distinction between fact and opinion is now firmly established in the case law of the circuits." *Potomac Valve and Fitting v. Crawford Fitting*, 829 F.2d 1280 (4th Cir. 1987).

Indeed, this Court has established the opinion defense in its various rulings regarding the well-recognized requirement of a false statement of fact in order for there to be actionable defamation. *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, 283-284 (1974) ("Before the test of reckless or knowing falsity can be met, there must be a

false statement of fact."); *Hustler v. Falwell, supra*, 108 S.Ct. 876 (1988) (Public figures may recover for libel or defamation only when they can prove both that the challenged statement was false and that the statement was made with the requisite level of culpability.); see also, *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (Kennedy, J.) ("Statements not themselves factual . . . are commonly statements of opinion, not fact.").

The opinion defense has now been specifically embraced by all of the federal circuits. *See, e.g., Fudge v. Penthouse*, 840 F.2d 1012 (1st Cir.) *cert. denied*, 109 S.Ct. 65 (1988); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987); *Potomac Valve and Fitting v. Crawford Fitting*, 829 F.2d 1280 (4th Cir. 1987); *Church of Scientology v. Cazares*, 630 F.2d 1272 (5th Cir. 1981); *Orr v. Argus Press Co.*, 586 F.2d 1108 (6th Cir. 1978) *cert. denied*, 440 U.S. 960 (1979); *Action Repair Inc. v. American Broadcasting Co.*, 776 F.2d 143 (7th Cir. 1985); *Janklow v. Newsweek*, 788 F.2d 1300 (8th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272 (1986); *Koch v. Goldway*, *supra*, 817 F.2d 507 (9th Cir. 1987); *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983); *Keller v. Miami Herald Pub. Co.*, 778 F.2d 711 (11th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985).

Petitioner asks this Court to believe that each of the federal circuits' recognition of the opinion defense is based upon an unwarranted, even erroneous misreading of the "dicta" of *Gertz v. Robert Welch*, Inc., 418 U.S. 323 (1974) that "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for it correction no on the conscience of there is no such thing as a false idea" and that judges and juries are not to pass judgment on expressions of opinion. *Id.* at 339. However, statements of opinion have evolved into protected speech quite simply because, as noted by this Court in *Gertz*, an opinion simply cannot be false and actionable defamation requires the utterance of a false statement of fact. "Since an opinion is protected because it cannot be false and a statement is not actionable defamation unless it is false, 'an opinion is simply not

actionable defamation.'" *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983) (citing Restatement (2d) of Torts, Section 558(a) (1977).

Moreover, Petitioner's attempt to distinguish *Hustler v. Falwell, supra*, on the ground that the *Falwell* case came to this Court along with a jury finding that there had been no statement of fact uttered about Reverend Falwell is unavailing. The determination of whether a challenged statement is one of fact or of opinion is a question of law for the court. *Matter of Yagman, 796 F.2d 1165, 1172 (9th Cir. 1986); Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983); Orr v. Argus Press Co., 586 F.2d 1108, 1114 (6th Cir.), cert. denied, 440 U.S. 960 (1979); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); see Letter Carriers v. Austin*, 418 U.S. 264 (1974) *(Reversing judgment because, as a matter of federal law, no factual representations could be inferred from challenged statements).* The fact that the district court in *Falwell* erroneously permitted the opinion defense to go to the jury does not mean that this Court's opinion in *Falwell* endorsed such a departure from the traditional constitutional roles of judges in determining whether a statement is opinion.

Petitioner asks this Court to view the statements complained of in this case as unprotected opinion without regard to the truth or falsity of the statements, but rather because they are vituperative and "pornographic", in the words of Petitioner. Such a view is neither warranted by the overriding First Amendment concerns which mandate the opinion defense nor by the facts of this case.

2. Vituperation Is Not Defamation.

As a matter of constitutional law, vituperative, pejorative or pernicious opinion is not actionable. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974), this Court stated:

> "Under the First Amendment there is no such thing as a false idea. *However pernicious an opinion may seem*, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (Emphasis added.)

Indeed, as a longstanding matter of law, vituperation and insulting words have not been actionable. Rather, they have long been recognized as protected "rhetorical hyperbole." *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, (1974) ("scab", "traitor"); *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970) ("blackmail"). *See also, Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966) ("bastard").

Petitioner's contention that *Letter Carriers* was a labor law decision with no precedent of value in the First Amendment context overlooks the fact that "the case explicitly applied First Amendment principles." *Dworkin v. Hustler Magazine, Inc.*, _F.2d _, 1989, WL 3925, 1989 U.S. App. Lexis 565, slip op. at 537 n.4 (9th Cir. Jan.24, 1989).

As Dean Prosser has stated, "A certain amount of vulgar name calling is tolerated, on the theory that it will necessarily be understood to amount to nothing more." W. Prosser & W. Keeton, *Handbook of the Law of Torts*, § 111, at 776 (5th Ed. 1984).

Most recently, this Court elaborated the protections which the First Amendment requires be given in cases such as this. *Hustler Magazine, Inc. v. Falwell*, U.S. , 108 S.Ct. 876 (1988). In *Falwell*, the Court reaffirmed that it is immaterial whether a publication about a public figure is made with a bad motive or ill will, or that the publication is "outrageous" or offensive. The Court accepted the fact that the publication in question was "offensive to [Falwell], and doubtless gross and repugnant in the eyes of most." 108 S.Ct. at 879. But this Court rejected a rule which would permit recovery "for speech that is patently offensive and is intended to inflict emotional injury even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved." *Id.*

Such a rule was rejected because it would interfere with "the heart of the First Amendment" - "the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" and "the freedom to speak one's mind." *Id.*

This Court noted that the sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of public figures. *Id.*

> "Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673 - 674 (1944), when he said that 'one of the prerogatives of American citizenship is the right to criticize public men and measures.' Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.' *New York Times*, supra, 376 U.S., at 270."

108 S.Ct. at 880.

Petitioner's attempt to cast the words used against her as statements which are "beyond the pale" ignores the longstanding and well-reasoned authority that caustic and vehement criticism is the price public figures must pay for their public figure status. Thus, even though the editorial in this case was likely offensive to Petitioner and perhaps even "gross and repugnant in the eyes of most", *Falwell, supra*, it is not unprotected opinion simply because it is vituperative and most it certainly does not justify this Court's reexamining and limiting the opinion defense.

3. There Is No Conflict Between The Circuits With Respect To The Fact/Opinion Test.

Petitioner asserts that there exists a conflict between the tests employed by the Second and Ninth Circuits for determining whether a challenged statement is one of fact or of opinion. In reality, however, any differences in the tests enunciated by these circuits amounts to nothing more than a difference in the words chosen to articulate the tests; indeed, both tests have as their common and most important denominator an analysis of the "totality of the circumstances" of the challenged statements with an emphasis on the context of the statements themselves.

Curiously, Petitioner asserts that the court below erred in applying its own test, rather than that of the Second Circuit, in determining whether the statements in this case were statements of fact or of opinion. Petitioner erroneously believes that choice of law principles require one federal circuit court of appeals to eschew its doctrine of when the plaintiff is a resident of the other circuit. Even if Petitioners were correct, however, the result would be the

same because the tests for opinion are essentially identical in the Second and Ninth Circuits. The Court below applied the three-pronged test which it had first applied in *Information Control v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980). Appendix A-6.[3/] That test requires examination of the language used, the context (i.e., the facts surrounding the publication), and whether the statement was made in circumstances in which the audience would anticipate efforts by the parties to persuade others to their position by use of epithets or hyperbole. *Information Control*, 611 F.2d at 783-784, *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983).

Petitioner concedes that the test enunciated by the Second Circuit in *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 739 F.2d 219 (2nd Cir. 1985), like the Ninth Circuit test, places great emphasis on the context in which the challenged statements are made and the circumstances surrounding the making of those statements; however, she argues that the Second Circuit test is in conflict with the Ninth Circuit because it contains a separate analysis concerning whether or not the statements are objectively capable of being proved true or false.

The inclusion of this "verifiability" prong does not set the respective tests in conflict with one another; indeed, both tests require, as their dominant feature, an analysis of the context of the statements and the surrounding circumstances of publication. In particular, the Second Circuit test enunciated in *Mr. Chow* was adopted from the four part test enunciated by the D.C. Circuit in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985). See *Mr. Chow*, *supra*, 759 F.2d at 226. *Ollman* noted, however, that none of the four factors was paramount, particularly that of verifiability. On the contrary, *Ollman* emphasized the context in which the statements appear and the language surrounding the challenged statements.

> "We do not, of course, suggest that the four factor analysis is to be undertaken in a

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3/ References to the Appendix noted herein are references to the specific pages of the Appendix to the Petition for Writ of Certiorari.

> rigid locked-step fashion. Thus, as will become evident below, a logical starting point in applying the fact-opinion analysis may be the broad social context or setting within which the defamatory statement appears (factor "four") and the language surrounding the challenged statements (factor "three").

Ollman, supra, 750 F.2d at 980, footnote 17.

Indeed, *Ollman* cited approvingly to the Ninth Circuit test of *Information Control,* noting that:

> "The degree to which a statement is 'laden with factual content' or can be read to imply facts depends upon the article or column, taken as a whole, from which the statement is a part. [Citation omitted.] The language of the entire column may signal that a specific statement which, standing alone, would appear to be factual is in actuality a statement of opinion."

750 F.2d at 982.

Moreover, the Fourth Circuit Court of Appeals, which has adopted the *Ollman* four-prong test, has dismissed the verifiability prong which Petitioner contends creates a conflict in the respective tests when the other prongs of the test demonstrate that a challenged statement is one of opinion.

> "Even when a statement is subject to verification, however, it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it. [Footnote omitted.] Thus we reject the suggestion, advanced by the plaintiffs in this case, that any 'question of fact' which can be decided by a jury can be actionable as defamation. Such a test ignores the underlying purposes of the fact/opinion distinction, and would lead to results that could not be reconciled with the developing case law in other circuits." [Footnote omitted.]

Potomac Valve and Fitting v. Crawford Fitting, supra, 829

F.2d 1288. The *Potomac Valve* court went on to note:

> "We hold that a verifiable statement, a statement that has failed the second *Ollman* factor, nevertheless qualifies as an 'opinion' if it is clear from *any* of the three remaining *Ollman* factors, individually or in conjunction, that a reasonable reader or listener would recognize its weakly or substantiated or subjective character - and discount it accordingly." (Emphasis in original.)

Id.

This is precisely what the court below has done in this case. In examining the context of the entire editorial column, the court noted:

> ". . . Hustler is a magazine known for its pornographic content and is directed to an audience sympathetic to pornography, and that the 'Asshole of the Month' column is an especially frequent vehicle for Hustler's lampooning of its critics, all will telegraph to a reader that the article presents opinions, not allegations of fact."

Appendix A-7. The court went on to note that:

> "While Hustler's remarks were not uttered in a live public debate, it nevertheless is an active participant in an ongoing, heated debate on the subject. Readers of the article, recognizing that it concerns a public, vigorous opponent of pornography, will read Hustler's vituperation as exaggerated criticism of the views she holds."

Appendix A-8.

Indeed, a great majority of cases from the various circuits concerning the opinion defense base their analysis, in large part, on the "context" analysis of the challenged statements themselves as well as the "totality of the circumstances" surrounding publication which, as Petitioner concedes, are features common to both the Ninth and Second Circuit tests. See, e.g., *Koch v. Goldway*, 817 F.2d 507 (9th Cir. 1987); *Ollman v. Evans*, 750 F.2d 970

(D.C. Cir. 1984); *Janklow v. Newsweek*, 788 F.2d 1300; *cert. denied*, 479 U.S. 883, 107 S.Ct. 272 (1986); *Keller v. Miami Herald*, 778 F.2d 711 (11th Cir. 1985); *Potomac Valve and Fitting v. Crawford Fitting, supra*, 829 F.2d 1280 (4th Cir. 1987).

Petitioner is therefore simply incorrect in arguing that if a statement appears objectively verifiable that statement must automatically be viewed as fact and not opinion. Even apparent factual statements must be allowed as opinion "when the surrounding circumstances of a statement are those of a heated political debate, or if certain remarks are necessarily understood as ridicule or vituperation, or both, but not as descriptive of factual matters." *Koch v. Goldway, supra*, 817 F.2d at 509. *See also, Janklow v. Newsweek, Inc., supra*, 788 F.2d 1300, 1302 (8th Cir. 1986).

Moreover, Petitioner's plea that certain of the statements made in the editorial are objectively verifiable is simply unavailing. Viewing the statements in context, as the court below correctly did, it is clear that Hustler was simply expressing its opinion that the kind of individuals who engage in the anti-pornography campaign and believe that "pornography" leads to rape and violence against women hold unfounded beliefs and are the type of women who are not liberated in the manner that Hustler advocates. In fact, it is precisely the point of *Gertz* that just as there is no such thing as a false idea, the judicial process is not available for proving whether one person's ideas are "founded" or "unfounded." Such disputes are to be resolved in the marketplace of ideas, not in the courts.

The statements which Petitioner contends are "verifiable" in this case all relate to Respondents' characterizations of Petitioner's belief and subjective state of mind. Such opinions are hardly verifiable, any more than the motives of a state prosecutor are verifiable. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986); *Deupree v. Iliff*, 860 F.2d 300, 303-304 (8th Cir. 1988) (plaintiff's intrinsic, personal satisfaction in her job is not verifiable). Characterizations of one's state of mind are inherently unverifiable, depending as they must on the subject's own self-serving assertions as to what he or she actually believes or feels. Otherwise, a libel plaintiff could always defeat the opinion defense simply by asserting that

the defendant's characterization of his or her beliefs is inaccurate, and that the only person who truly knows the plaintiff's beliefs is the plaintiff himself or herself.

Thus, while Petitioner would understandably like to construct some reviewable conflict between the circuits in the application of the opinion defense, the truth is that the circuits apply a uniform analysis in the determination of whether statements are fact or opinion and any differences are limited largely to the way in which that analysis is articulated. In this case, the court below applied the appropriate test and correctly concluded that the challenged statements were constitutionally protected opinion.

4. Petitioner's Claim Of Misappropriation Of Image Presents No Constitutional Issue Worthy Of Review.

Petitioner asks this Court to review the decision of the court below dismissing her tort claim of misappropriation of image. This claim presents absolutely no constitutional issue worthy of review by this Court; indeed, the question is one entirely of principles of state law. Petitioner concedes this by arguing that the court below did not properly apply *New York law* in dismissing her claim. Petitioner concedes further that a review of this issue is significant only as a matter of her own personal interest, and not as a matter of public importance. See Petition for Writ of Certiorari at Page 17. Notwithstanding this, it is clear that the Court below reached the correct result. The Court noted that Petitioner's claim would fail under *either* New York or California law because Petitioner's image "was not used exclusively for Hustler's commercial gain." (Citing New York Civil Rights Law § 51, providing a cause of action for use of picture without consent for advertising or purposes of trade.) Appendix A-9. As the court correctly noted: "The fact that Hustler Magazine is operated for profit does not extend a commercial purpose to every article within it." *Id.*

III.

DAMAGES SHOULD BE AWARDED TO RESPONDENTS PURSUANT TO SUPREME COURT RULE 49.2

Not only should the Court deny the petition for a writ of certiorari, but it should also award Respondents damages

pursuant to Rule 49.2 of the rules of this Court. Rule 49.2 provides:

> When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

This Court has not hesitated to impose such damages on Petitioners filing frivolous petitions for certiorari in appropriate cases. *See Hatch v. Reliance Insurance Co.*, 474 U.S. 1048 (1986); *Hyde v. Van Wormer*, 474 U.S. 992 (1985); *Tatum v. Regents of University of Nebraska*, 462 U.S. 1117 (1983).

The petition for a writ of certiorari in this case clearly qualifies as frivolous. In order to prevail, Petitioner must persuade this Court to overturn its unanimous, one year old decision in *Hustler Magazine, Inc. v. Falwell*, and in fact Petitioners ask this Court to do so. See Petition for Writ of Certiorari at 15-16, where Petitioner seeks "clarification or a review of the result in *Falwell, supra*."

Moreover, in order to prevail Petitioner must persuade this Court to reject the well-established protection, mandated by the First Amendment, granted to statements of opinion.

This is one of five similar lawsuits filed by the same attorneys on behalf of Petitioner and fellow anti-pornography activists against *Hustler* Magazine. The trial courts have dismissed each of these cases, either for failure to state a claim upon which relief can be granted or on a motion for summary judgment. *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890 (9th Cir. 1988); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988); *Dworkin v. Hustler Magazine, Inc.*, _ F.2d __, 1989 WL 3925, 1989 U.S. App. Lexis 565, (9th Cir., Jan. 24. 1989); *Spence v. Flynt*, slip op., Wyoming District Court, Eighth Judicial District, November 21, 1988; *Dworkin v. L.F.P., Inc.*, slip op., Wyoming District Court, Eighth Judicial District, November 21, 1988.

In *Dworkin v. Hustler Magazine, Inc.*, the Ninth Circuit served notice on plaintiffs such as Petitioner that in the future, sanctions may be appropriate when claims such as Petitioner's are pressed. Slip op. at 550. Respondents respectfully submit that this Court should serve notice on Petitioner and her attorneys, through an award pursuant to Rule 49.2, that such frivolous litigation will not be tolerated.

IV.
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: February 23, 1989

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State of California

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on February 23, 1989, I served the within *Respondents' Opposition Brief to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 23, 1989, at Los Angeles, California.

Claude A. Lagardère
(Original signed)